

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

047

No. 21,199

RONALD P. BERTON,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 17 1968

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No. 21,199

Questions Presented

1. Whether appellant's trial on three separate counts of arson, on all of which he was convicted, was prejudicial and plainly erroneous by reason of the joinder of the counts so as to entitle him, no motion for severance having been made, to reversal of the convictions.

2. Whether the trial court's misstatements of the evidence so prejudiced appellant on the vital issue of credibility, and whether the court so misled the jury on the presumption of innocence that appellant is entitled to reversal of his convictions.

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Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a conviction in the District Court of appellant Berton on three separate counts of arson involving three different fires occurring on three different days. This Court has jurisdiction under 28 USC §1291.

STATEMENT OF THE CASE

The indictment alleged that appellant Berton committed three separate acts of arson: (1) at 1305 East Capitol Street, S.E., on or about September 22, 1966; (2) also at 1305 East Capitol Street, S.E., on or about September 28, 1966; and (3) at Eastern High School, 17th and East Capitol Streets, N.E., on or about November 8, 1966.

On motion of the Government, appellant was twice sent to St. Elizabeths for mental observation, the first time for nearly sixty days, the second time for nearly thirty days. Both times, the reports of the Hospital, the first dated February 28, 1967 and the second dated May 5, 1967, which are in the pre-trial record, indicated appellant has full mental health.

The evidence showed, and it is not disputed, that fires occurred in the basement of the apartment building at 1305 East Capitol Street, S.E., on September 22 and 30, 1966, and that a fire occurred in a storeroom near the auditorium at Eastern High School on November 8, 1966. Fire Department officials testified they concluded that the fires were "of incendiary origin." Tr. 67, 72, 73.

Three Government witnesses accused appellant. All three know appellant. Juanita Johnson, age 16, was his girl friend; Anthony

Johnson, age 15, is Juanita's brother; William Ferguson knew appellant at Laurel Youth Center.

Anthony Johnson testified that on September 22, 1966, he walked from his house with appellant, who said he wanted to set something on fire. He testified that they went to "1303" East Capitol Street, and that he went inside with appellant and watched him set the stairway on fire. He further testified that after they left the building and while they were still in the neighborhood where the fire was, his sister came and that appellant told her he set the building on fire. Tr. 26, 33.

Juanita Johnson testified that prior to September 22, 1966, appellant told her, when they were walking together in the neighborhood, he wanted to set some place on fire, and that she went inside 1305 East Capitol Street with him on that occasion. He said "he would like to set old buildings on fire so we went to see if he could set them on fire." Tr. 34-35. She said that at 6:00 or 6:30 on September 22 she heard a fire siren and ran toward 1305 East Capitol Street. She saw the appellant and her brother and "he told me he set the place on fire and had gone in to rescue the people." She testified that a week later she was walking with appellant and he went into 1305 East Capitol Street while she remained outside. He came out and told her he had "set the place

on fire again" and that the janitor would be running across the street to pull the fire alarm. In about two or three minutes "the man [from out of the apartment building] ran across the street." Tr. 36. They left when they heard sirens.

"Somewhere around November 8" she saw him at Eastern High School where she was a student. "When we heard the fire alarm. It was during a lunch period and as I was going down the stair from the library on the second floor it was between the landing. I was standing and he was coming between the doors of the auditorium." She testified she did not speak to him. Tr. 37.

William Ferguson, who attended Eastern High School, testified he saw appellant around 1:00 o'clock on November 8 at a delicatessen across the street from the school. "He told me he was going to burn the school down . . . I didn't say anything. I didn't pay too much attention. I had another class and had to hurry up and get to school." He testified that later he was in the auditorium, that he saw a fire and that as he was running to get a fire extinguisher he saw appellant come out of a door that leads to the storeroom where the fire occurred and to the back of the stage. He testified, as did others, that the handle of the door to the storeroom had been broken. Tr. 53-55.

Appellant testified that he was with Juanita and her brother when there was a fire in the neighborhood on September 22. He denied setting the fire and denied telling Juanita he had set the fire. He testified that on September 30 he was walking with Juanita when he saw fire trucks. He denied setting a fire and telling Juanita that he had set it. Tr. 85, 87, 91, 92. He testified that on November 8 he saw William Ferguson at the delicatessen near Eastern High School and that firemen were on the scene while he was talking with Ferguson there. He testified that he did not go into the school at any time on that day. Tr. 83-92.

Appellant further testified that Juanita was angry with him and told him so the first or second week of October when she discovered he had infected her with a venereal disease. He further testified she told him she would get him in trouble. Tr. 87. He testified that Anthony Johnson also had a reason for lying of which he knew in that he, appellant, was unable to give him a lot of money as he had promised to do and because "his sister was angry at me because of what I did to her." Tr. 91-92. He further testified that when he and Ferguson were at Laurel they fought "all the time." Tr. 88.

The following testimony was given in rebuttal to appellant's testimony that the three were biased against him: Anthony Johnson

said that on September 22 he asked appellant to loan him 50 cents and was refused. Tr. 99. Ferguson denied having fights with appellant at Laurel. Tr. 102-103. Juanita Johnson said she learned of her disease October 10. "That is why I walked away from him." "The Monday after that," which was before November 8, she saw appellant at Eastern. He reproached her for walking away from him the week before. She told him she didn't want to have anything to do with him or to see him any more because of his having given her the disease. "And so he threatened me . . . He told me he didn't like what I was doing and that he would get even with me some way or the other that he didn't have to bother me himself, that he could have some friend do it for him . . . and for me not to be surprised if one day when I was walking from school he would pull a gun on me or throw something out of a car or one of my brothers or sisters got hurt." She further testified that she saw the appellant two weeks before the trial and the week before the trial. ". . . the first time he explained to me that he wasn't going to bother me, that he wasn't going to hurt me any way at all because through his religion he had found the true meaning of himself and although he was mad at me for putting him in jail, that was over and done with and by putting him in jail I had put clothes on his back and money in his pocket and so I said, 'You are welcome.' So

he told me when he got on the witness stand that he was going to say some things about me that weren't true but that this wasn't going to hurt me because he didn't want to go to jail. He was really going to tear me up but he didn't want to hurt me but he had to stop himself from going to jail some way or the other." Tr. 108-110.

SUMMARY OF ARGUMENT

I

Appellant was tried on three separate counts of arson, at least one of which was not properly triable with the other two (a) because the Government would not have been permitted to prove the one count by evidence as to the other two, and vice versa, had there been separate trials, and (b) because appellant was plainly prejudiced by the joinder. The prejudice was heightened by the nature of the crimes charged, by a remark of the Government and a remark of the court which clearly had the effect of telling the jury to cumulate the evidence, by the judge's failure to tell the jury to consider the evidence separately, by the weakness of the evidence on the clearly separable count, and by the nature of the evidence as to all the counts (accusations by persons who knew appellant and whom appellant contended were biased against him and accused him falsely). That no motion for severance was made does not mitigate the error

or appellant's right to reversal on the ground of prejudicial joinder. In the light of the cases and the record the error was plain error affecting substantial rights.

II

The trial judge seriously misstated the evidence, and seriously prejudiced appellant on the vital issue of credibility, when he told the jury that a witness against appellant had alleged he had threatened her and her family if she ever told anyone he had set any fires, which was the crime for which appellant was on trial. The witness had in fact alleged that the defendant had threatened her and her family regarding another matter and had further testified that even that threat had been withdrawn. The judge also prejudiced appellant on the vital issue of credibility when he misstated appellant's allegation of bias against another witness. Furthermore, the judge misled the jury on the fundamental matter of the presumption of innocence, and implied that the Government would prove and had proved its case, when he told the jury that the presumption "attaches to the defendant and remains with him throughout the trial until the Government proves beyond a reasonable doubt that the defendant is guilty," and that the presumption "attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt." The use of the word "until," instead

of the word "unless," in describing the presumption of innocence to the jury, was misleading and wrong. The word carries the clear connotation that the events that must occur in order for the presumption to be overcome will occur by the end of the trial and implies that the trial is a procedure which, however necessary, has a predetermined result. The immediate context did not dissipate this connotation; rather, it strengthened it. And the rest of the charge did not dissipate the connotation. No objection to the instructions were made. But the errors were ^{so} serious and prejudicial as to constitute plain error affecting substantial rights.

ARGUMENT

Introduction

The record in the light of which the errors asserted must be viewed may be summarized as follows: Appellant was accused in the indictment of starting three different fires at three different times at two different places and he was tried on all three counts in the same trial. He denied all the accusations of the indictment. His denial was supported not only by his own testimony, which is in the record, but also by the failure -- after two examinations made at the instance of the Government -- of St. Elizabeths Hospital to find the mental aberration that is commonly associated with arsonists and which the Government itself, by having appellant sent

twice to St. Elizabeths, shows it associates with such conduct. The two letters dated February 28, 1967 and May 5, 1967 from St. Elizabeths which indicate, although admittedly they do not prove with absolute certainty, that appellant has full mental health, are in the pre-trial record but were not put before the jury. Appellant's accusers at trial were three people who knew him -- Juanita Johnson; her brother, Anthony Johnson; and William Ferguson. They provided the only evidence against appellant, who accused them of accusing him falsely. By appellant's testimony, confirmed as to themselves by the testimony of two of the three -- Juanita and Anthony Johnson-- the three had motives (apart from any unknown motives or motivations they may have had) for falsely accusing appellant -- Juanita, because appellant had infected her; Anthony, because he was Juanita's brother, and because he had been refused money by appellant; and Ferguson, because he had fought with appellant at Laurel.

I

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL TOGETHER OF ALL THREE COUNTS OF THE INDICTMENT ACCUSING HIM OF SETTING SEPARATE FIRES AT SEPARATE TIMES WAS PLAINLY AND SUBSTANTIALLY ERRONEOUS

The joinder for trial of three counts of arson charging that appellant set three different fires at three different times was erroneous and seriously prejudiced appellant. No motion for sever-

ance was made. Nevertheless, as will appear, the trial of the three counts together was plain error under Rule 52(b) and requires reversal.

The three separate fires occurred on September 22, September 30 and November 8. The first two were in a private apartment building at 1305 East Capitol Street, the third at Eastern High School at 17th and East Capitol Streets. Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), teaches that the considerations of economy and expedition in judicial administration which are fostered by joining counts in a single indictment and trial must give way to the right of the defendant not to be prejudiced -- by the confounding of his defense, by the inference of a criminal disposition, or by the improper cumulation of evidence by the jury, one or all of which are very likely to occur in any trial where separate counts are joined -- and, thus, that economy and expedition usually will triumph only if (1) no such prejudice will result or (2) the Government would be permitted to prove one count by evidence as to the others even if the defendant were not on trial for the others. As to the latter exception, assuming, what is not conceded, 1/ that

1/ We think the apartment building fires, as well as the school fire, should have been tried separately. In this connection, it is to be noted that the indictment charges that appellant set the
(Continued on p. 12)

evidence as to one of the apartment building fires would have been admissible in a trial on the other apartment building fire (because they occurred in the same part of the same building, eight days apart, with a similar modus operandi), evidence as to either of these fires was plainly not admissible to prove the school fire and vice versa. See Drew, supra, part II.

Drew, and also Gregory v. United States, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), show that where the evidence as to one count is not admissible as to the other but the counts are nonetheless tried jointly, prejudice resulting from the tendency of the jury to find a criminal disposition and to cumulate the evidence is the rule, not the exception. Plainly, appellant was so prejudiced by the trial together of the apartment building counts and the school count.

1/ (Continued from p. 11)

second apartment building fire on or about September 26, whereas it appears from the trial record that the second fire occurred on September 30. Tr. 39, 77. As a result of this deviation between the indictment and proof, there was considerable mix-up, which close study of the transcript accompanied by reference to a 1966 calendar straightens out. Tr. 36, 38-39. But the jury, which did not have the benefit of the transcript or of a 1966 calendar, must have been confused. The cases sometimes give content to the Government's self-protective phrase, "on or about," and make variations in date between indictment and proof not necessarily fatal. We assert, as did counsel below, Tr. 40, that the variation is fatal here, particularly in the context of the prejudicial joinder. Furthermore, we submit that it is very disquieting, and indeed inexcusable, and gives context and coloration to the other assertions of prejudice here made by appellant, that the Government could not and did not get the dates of all the fires right when it wrote the indictment.

The prejudice was heightened not only by the inflammatory nature, in the figurative as well as the literal sense, of the crimes charged, Kidwell v. United States, 38 App. D.C. 566 (1912), but also by the following significant features of the case:

1. The prosecutor asked appellant, "is it just a coincidence you were on the scene in three separate fires?" Tr. 89. However the question is parsed, its plain impact is an argument to the jury that appellant's admitted presence in the neighborhood of all three fires, itself innocuous enough since he was much in the neighborhood in the Fall of 1966, becomes more than coincidental in the light of the evidence such as it was, that he set all three fires. In other words, the question amounts to telling the jury to cumulate the evidence as to all three fires in considering the charges against appellant as to each. The court ratified and compounded this vastly prejudicial error by repeating it in its instructions to the jury. In summarizing the evidence, it told the jury that "the defendant maintains that it was only coincidental he was in the vicinity at the time when each of the fires which he allegedly set occurred." Tr. 124. Furthermore, the court never specifically charged the jury to consider the evidence of the three fires, or of the first two as opposed to the third, separately.

2. The Government's evidence against appellant with respect to

the third fire was very thin. Two witnesses, supported by the testimony of one of them that appellant had said shortly before the fire that he would burn the school down, testified only that they saw him coming from the direction of the fire at the time of the fire. Had the third fire been tried alone, conviction would have been most unlikely, if indeed the case had been allowed to go to the jury. Compare Gregory v. United States, supra, at Part II. "Here there was not only the danger of the evidence with respect to the two robberies [the three fires, cumulating in the jurors' minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies [the school fire] was so weak as to lead one to question its sufficiency to go to the jury. Thus its primary usefulness in this trial was to support the Government's case as to the robberies which resulted in the murder [the apartment building fires].". Similarly, the evidence as to the apartment building fires, which was itself none too strong, bolstered the negligible evidence as to the school fire.

We submit, then, that even assuming it was proper to try the two apartment building fires jointly, it was erroneous for the Government and the Court to try them together with the school fire. That a motion for severance was not made is not conclusive. Viewed in the light of the cases, which raise a strong presumption against

joint trial of counts when evidence as to each count is not admissible to prove the other counts, and in the light of each and all of the circumstances of this case outlined above, the prejudice to appellant from the joinder was so grave and so patent that it clearly constitutes plain error affecting substantial rights correctible on appeal under Rule 52(b). ^{2/} Compare Gray v. United States, 123 U.S. App. D.C. 40, 356 F.2d 792 (1966), where no severance motion was made and the judgment was affirmed, but where before this result was reached the court, "despite [the fact that no motion or protest was made], . . . carefully searched the record to determine whether there was plain error affecting substantial rights" and found no prejudice. ^{3/}

^{2/} It is clear that the joinder here does not come under the narrow exception to the rule against joinder of crimes not admissible to prove each other epitomized by Dunaway v. United States, 92 U.S. App. D.C. 299, 205 F.2d 23 (1953) and discussed in Part III of Drew.

^{3/} If the law is such that had severance been sought appellant would have been entitled to separate trials, but severance not having been sought the plain error rule does not suffice to entitle him to a new trial, then counsel on appeal would seem to have no choice but to assert that counsel below was ineffective in failing to move for severance and that reversal should be had on that ground. Where separate crimes are charged in one indictment there seems to be no way to obviate the requirement that counsel, to be effective, must be alert to move and press for severance unless it is clear that the defendant is not entitled to it. Here it is clear that the defendant was entitled to it.

II

REVERSAL IS ALSO SUPPORTED AND REQUIRED BY THE COURT'S INSTRUCTIONS TO THE JURY WHICH MISSTATED THE EVIDENCE AND MISLED THE JURY OF THE PRESUMPTION OF INNOCENCE TO THE SERIOUS PREJUDICE OF APPELLANT.

"A trial judge must exercise great care when he summarizes specific evidence in the case for the jury . . ." Cooper et al. v. United States, 123 U.S. App. D.C. 83, 357 F.2d 274 (1966). (Concurring opinion). Nothing requires the court to summarize or comment upon the evidence and we respectfully submit that when, absent a request by the defense that he do so, he chooses to do so, a heavy burden rests upon him to state the evidence correctly. In this case, the judge's summary was inaccurate in two very significant respects and in both instances the inaccuracies severely prejudiced appellant. The judge told the jury "the Government contends that the defendant threatened to do bodily harm to [Juanita, and her brothers if she mentioned to anyone that the defendant had set any fires." Tr. 125. This statement is seriously inaccurate. What Juanita testified was that appellant threatened her and her brothers and sisters because she refused to continue seeing him. This was before appellant had been charged with the crimes. Shortly before the trial, according to Juanita, he told her "he was not going to bother me, that he was not going to hurt me any way at all." Tr. 110. Thus, the jury was

told that a threat had allegedly been made to Juanita by appellant (and, for all it appeared, was still hanging over her) for her having made the very allegations for which the appellant was on trial, when in fact there was no testimony that appellant had so threatened her and also, by Juanita's own testimony, the threat that she alleged had been made had been withdrawn. ^{4/} Secondly, the judge said that appellant asserted that Anthony Johnson was biased because appellant had refused to give him money which he had promised him. Tr. 124. But the basis of appellant's belief and assertion of bias was, of course, not only this but also the fact that Anthony is the brother of Juanita, who was angry at appellant for infecting her, and appellant specifically so stated. Tr. 91. For the trial judge to leave out this other aspect of appellant's allegation of bias against Anthony Johnson was obviously prejudicial.

These misstatements of the evidence by the trial judge, like the erroneous joinder of counts, undermined the very essence of appellant's defense, which challenged the credibility of the witnesses who accused him. See Wynn v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,273, Nov. 16, 1967). There is no justification

^{4/} The court's misstatement came almost at the end of the charge and was the concluding sentence in its summary of the evidence and contentions.

for requiring appellant to bear the burden of these misstatements. The failure of appellant's counsel to object does not cure or mitigate the error. It cannot be assumed that because counsel did not object the error was not prejudicial. Counsel may have not recalled precisely what the testimony was and thus may have not been aware of the misstatement. On the other hand, those jurors who were not clear as to the precise testimony would almost certainly have accepted the judge's version of it, while those who thought they were sure that the judge had misstated it could not help but have doubts placed in their minds by the judge's declaration as to what the evidence was. We submit that it is not enough that the judge told the jury to trust their own memories. Tr. 121, 125. It is only sufficient if he, having undertaken to state the evidence, states it correctly in all important respects.

Furthermore, the judge twice told the jury that the presumption of innocence attaches to the defendant "until" [emphasis supplied, the Government proves him guilty. The exact words are as follows:

At Tr. 4:

"Every defendant in a criminal case, including this defendant, is presumed to be innocent and this presumption of innocence attaches to the defendant and remains with him throughout the trial until the Government proves beyond a reasonable doubt that the defendant is guilty of the offense or offenses as charged against him in the indictment."

At Tr. 117:

"Moreover, it is the rule of law that a defendant in a criminal case is presumed to be innocent and this presumption of innocence relates to every essential element of the offense and attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt."

The use of the word "until," in describing the presumption of innocence to the jury, was misleading and wrong. The word carries the clear connotation that the events that must occur in order for the presumption to be overcome will occur by the end of the trial and implies that the trial is a procedure which, however necessary, has a predetermined result. The context did not dissipate this connotation; rather, it strengthened it. The first definition of the word "until" in Webster's Third New International Dictionary is: "used as a function word to indicate movement to and arrival at a destination." [Emphasis supplied]. None of the other definitions of the word connote possible non-arrival at a destination. The word that should have been used in the instruction was "unless." At the very least, the instruction should have been "unless and until."

We recognize that published court opinions in criminal cases often employ the "until" phraseology. No doubt the word has even, at least in passing, been sometimes approved for jury instructions by appellate courts, though not favored over the use of "unless."

See the discussion in Corrin v. United States, 156 U.S. 432, 452-461 (1895). As an abstract matter, to judges and lawyers versed in the subtleties of the interrelated concepts of presumption of innocence, burden of proof and reasonable doubt, the "until" phraseology is not misleading and is correct, but it is misleading and seriously erroneous, for the reasons stated, to put that phraseology to a jury.

Of course, the Government will contend that the effect on the jury of the misleading statement of the presumption of innocence must have been dissipated by the further charge on reasonable doubt. Tr. 4-5, 117-118. But it can just as well, and indeed better, be argued that the "until" phraseology chosen by the judge to state the presumption of innocence dissipated the effect of the other instruction. ^{5/} Again, the failure of appellant's trial counsel to object does not overcome the error, which was plain error affecting appellant's fundamental right to have the benefit of the presumption of innocence.

^{5/} Moreover, the reasonable doubt charge was very brief and quite abstract. It did not specifically inform, and no other part of the charge specifically informed, the jury that if they had a reasonable doubt they must find the defendant not guilty or that unless the Government met its burden of proof beyond a reasonable doubt defendant must be found not guilty. Compare the charge on reasonable doubt set out at n. 2 in Scurry v. United States, 120 U.S. App. D.C. 374, 347 F.2d 468 (1965).

These errors in the instructions, taken separately and together, unfairly prejudiced appellant on the vital credibility issue and, together with the erroneous joinder for trial of the separate counts, support and require reversal of appellant's conviction.

CONCLUSION

For the reasons stated, the judgment of conviction should be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

William H. Willcox
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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
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FRANK Q. NEBEKER.

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Cr. No. 1449-66

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the trial judge committed plain error in not ordering a severance of the counts of the indictment for trial where no motion for severance was made, where the absence of such a motion may have been grounded in an arguably sound defense decision that appellant was better off with a joint trial, and where the short trial was conducted in a manner which made it unlikely that the jury was confused by the evidence or misused it?

2) Whether the trial judge's mistaken statement as to why appellant had threatened Juanita Johnson amounted to plain error where a jury mistake as to this collateral matter would not reasonably have affected their determination whether to believe Juanita's inculpatory testimony and where the jury was instructed twice that their recollection of the testimony, not the court's, was controlling?

3) Whether the presumption of innocence instructions were plainly erroneous?

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<i>Trent v. United States</i> , 109 U.S. App. D.C. 152, 284 F.2d 286 (1960), <i>cert. denied</i> , 365 U.S. 889 (1961)	14
* <i>United States v. Edwards</i> , 366 F.2d 853 (2d Cir. 1966), <i>cert. denied</i> , 386 U.S. 908 (1967)	17
<i>United States v. Heath</i> , 20 D.C. 272 (1891)	18
* <i>United States v. Lotsch</i> , 102 F.2d 35 (2d Cir.), <i>cert. denied</i> , 307 U.S. 622 (1939)	14
<i>Williams v. United States</i> , 116 U.S. App. D.C. 131, 321 F.2d 744, <i>cert. denied</i> , 375 U.S. 898 (1963)	14
<i>Young v. United States</i> , 55 App. D.C. 19, 299 Fed. 883 (1924)	18

OTHER REFERENCES

22 D.C. Code § 401	1
Rule 8(a), Fed. R. Crim. P.	12
Rule 14, Fed. R. Crim. P.	12
Rule 30, Fed. R. Crim. P.	17
Rule 52(b), Fed. R. Crim. P.	13
9 WIGMORE, EVIDENCE § 2511 at 407 (3d ed.)	18

 *Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,199

RONALD P. BERTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A three-count indictment filed on December 19, 1966, charged appellant with the commission of three separate acts of arson (22 D.C. Code § 401), the first at a building located at 1305 East Capitol Street, Southeast, on or about September 22, 1966, the second at the same building on or about September 28, 1966, and the third at Eastern High School (hereinafter "Eastern"), 17th and East Capitol Streets, Northeast, on or about November 8, 1966. Jury trial before Judge Youngdahl began on June 21, 1967, with the *voire dire*, selection and swearing of the jury

and the prosecutor's opening statement. The following day, a Thursday, the Government's case-in-chief, the defense case and the Government's rebuttal case were completed. On Monday, June 26, 1967, after closing arguments and the court's instructions the jury found appellant guilty as indicted. An indeterminate sentence under the Youth Correction Act was imposed on July 7, 1967.

The Government's Case-in-Chief

Twelve witnesses testified in the Government's case-in-chief, but their testimony, both on direct and cross-examination, occupies only about 55 pages of the transcript (Tr. 19-41, 45-79).¹ That testimony in the order in which the witnesses appeared is summarized below.

Madison Tikmor, principal at Eastern, 17th and East Capitol Streets, Northeast, testified that about 1:00 P.M., November 8, 1966, his attention was directed to a fire in the auditorium. Rushing there he saw a "blaze reaching high into the ceiling." The fire was in a store room to the right of the auditorium. After the fire department had extinguished the fire, the witness surveyed the damage. The stairs leading down into the store room were burned as were cartons inside containing light bulbs. A large number of bulbs were cracked. (Tr. 23-25.)

Anthony R. Johnson, of 6 Fourteenth Street, Southeast, 15 years old, came to know appellant in September of 1966 when the latter was coming to the Johnson residence to see his sister, Juanita. September 22, 1966 was the date of one such visit. At about 6:00 P.M. when appellant left he invited Anthony to accompany him to the bus stop. While they were walking together appellant confided that he wanted to set something on fire. Anthony thought appellant was joking. They entered the front door of an apartment building at "1303" East Capitol Street and walked down the corridor to the stairs leading to the basement. While Anthony waited at the top of the stairs, ap-

¹ The opening statements and closing arguments are in "A. Tr." The rest of the proceedings are in "Tr."

pellant descended them and went out of sight momentarily. Returning into Anthony's view, appellant had a blue blanket which he "stuck" between the stairway and a small brick wall. Appellant ignited the blanket with a match. The two then left the building, walked half way down the block and returned in time to hear "everybody . . . yelling 'fire'." The fire engines came. Juanita came to the fire and appellant told her that he had set it. (Tr. 26-33.)

Juanita E. Johnson, 16 years old and a junior at Eastern, met appellant on August 28, 1966, and saw him once or twice a week from then until October 10, 1966. On Tuesday, September 15, 1966, during a walk they were taking appellant expressed a desire "to set some place on fire." At his behest they went into 1305 East Capitol Street and looked around. Appellant then examined other buildings in the area, which were apparently old, and "said he would like to set old buildings on fire." On the following Thursday, September 22, appellant came to Eastern and walked Juanita home. Shortly after he had left at 6:00 or 6:30 with her brother, Anthony, she heard a fire siren and ran towards 1305 East Capitol Street. A crowd had gathered there and fire engines had arrived. She saw appellant and her brother there, and while the three were talking appellant told her he had set the fire. The following Friday, which was September 30, 1966,² during another walk which she took with appellant, he went inside 1305 East Capitol Street alone and stayed about five minutes. Coming outside he informed her that he had once again set the building afire and that she would shortly see the janitor run across the street to the fire alarm. Two or three minutes later the man did run from the building to across the street. Hearing sirens, she and appellant left. Juanita also saw appellant the day

² The witness's attention was directed to September 28, the date alleged in count two of the indictment, a Wednesday. Her testimony makes clear that the count two fire in fact occurred on September 30, 1966 (Tr. 36, 38-39). When this was discovered the judge denied a defense motion to dismiss count two for alleging on "or about September 28" (Tr. 39-40).

of the fire at Eastern, around November 8. While the fire alarm was sounding she observed him "coming between the doors of the auditorium." She did not speak to him. (Tr. 34-37, 40.)

Samuel Ochs testified he was part owner of 1305 East Capitol Street. Sometime in September 1966 he responded to those premises and found evidence that a fire had occurred in the basement (Tr. 45-46).

Thomas E. Bond was the janitor at 1305 East Capitol Street at the time of the first fire in September 1966. He was called out of his room to discover the basement full of smoke. Firemen came and put the blaze out. Bond saw his blue blanket still burning slowly between the wall and the stairway leading from the basement apparently when the fire was nearly extinguished. The wood on the stairway had been burned. The second fire occurred some one week later at around 6:00 P.M. He was again home, saw the fire, "pulled the rug out and stomped on it," went across the park and asked the policeman there to call the fire department. The stairway was scorched where the rug had been burning. (Tr. 47-48, 50-52.)

William D. Ferguson, Jr., a student at Eastern, saw appellant in the Eastern Delicatessen, across the street from the school, at about 1:00 P.M., November 8, 1966. Appellant stated "he was going to burn the school down." Later William was seated in the Eastern auditorium when he saw "a big stream of smoke." While hurrying to get a fire extinguisher, he observed appellant coming through the door leading to the rear of the stage and to a store room off the rear. To appellant's inquiry as to what had happened Ferguson replied that the school was on fire. The witness and a Frank proceeded with an extinguisher to the store room, the location of the fire, and discovered the door jammed and the door handle broken off. While they were attempting to break down the door with an axe, the fire department arrived. (Tr. 53-55, 59.) William identified two photographs of the scene marked as Government Exhibits Nos. 1 and 2 (Tr. 56-57). On cross-examination he stated he had known appellant at the Laurel Youth Center in 1964 (Tr. 58).

Steven G. Flock, a senior at Eastern, was in the balcony of the school auditorium at around 1:00 P.M., November 8, 1966, when he saw a flame and smoke coming from the right side of the stage. Getting fire extinguishers he and a couple of his friends went back to the store room where bulbs were kept and attempted to break down the door and put the fire out. The fire department then came and broke the door open. As he approached the fire he observed a person clad in a dark coat and a hat in the vicinity of the store room. This witness also identified Exhibits 1 and 2. (Tr. 60-63.)

Inspector George I. Meyer of the Fire Investigation Section, D.C. Fire Department, was qualified as an expert on the causes of fires. He described the fire damage he saw at 1305 East Capitol Street on the evening of September 22, 1966.³ It was his opinion that that fire was "of incendiary origin", i.e., had been purposely set. (Tr. 64-65, 67-68). At about 1:00 P.M., November 8, 1966, he went to the stage area of the auditorium at Eastern. A fire had been confined to a store room there which contained "cardboard cartons, light bulbs, electric wire, ladders and general maintenance equipment. . . ." These items had been severely burned. He identified Government Exhibits 1 through 4 as photographs he took at the scene of the fire. These were admitted into evidence. The floors, walls and ceiling of the store room "had been blackened by the heat of the fire." In his judgment that fire was also of incendiary origin. (Tr. 68-72.)

Joseph Jones, head custodian at Eastern, had a key to the store room behind the auditorium. He did not go into that room or give anyone his key on November 8, 1966. (Tr. 73-74.)

Ralph B. Robinson, the electrician at Eastern, also kept a key to the store room on his person. Only he and Jones had such keys. (Tr. 75-76.)

³ The transcript shows that the witness's attention was directed to December 22 (Tr. 64). Whether or not this is a misprint, it seems clear that the inspector was describing the scene of the September 22 fire (Tr. 65).

Inspector Robert L. Perry, D.C. Fire Department, was also qualified as an expert on the causes of fires. He responded to 1305 East Capitol Street at around 8:30 P.M., September 30, 1966. There he found evidence of a fire which had occurred between the first and second floors. A scatter rug had been "stuffed in a hole in the wall" and ignited. It was his opinion that the blaze had been purposely set. (Tr. 76-79.) The Government then rested its case (Tr. 79).

The Defense Case

Detective Stern, Criminal Investigation Division, Metropolitan Police Department, testified briefly that he arrested appellant around 5:00 P.M. November 8, 1966. He had earlier spoken to Juanita Johnson at Eastern. She had given him appellant's name and had said that appellant was responsible for the fires at 1305 East Capitol Street. When arrested appellant denied any knowledge of the fires. (Tr. 80-81.)

Appellant then took the stand. On September 22, 1966, he did visit Juanita Johnson at her home. Anthony Johnson left with him at about 7:00 P.M. They saw a fire and went down the street to watch it. Juanita joined them. Appellant never went inside the building or said that he had set the fire. (Tr. 82-84.) On September 30, 1966, he visited Juanita. They walked towards the stadium and on the way back fire trucks were arriving at an apartment building on East Capitol Street. He did not tell her he had set that fire. (Tr. 84-85.) Appellant did see William Ferguson in the delicatessen on November 8, 1966, but at the time the fire trucks were arriving. Appellant did not enter the school at any time on that day. Ferguson told him about the fire. (Tr. 86, 88, 93-94.) Juanita's testimony was not true. She had become angry with him and had said she would get him in trouble when she discovered that he had communicated a venereal disease to her. (Tr. 87-88.) He had known Ferguson at Laurel. They "never did get along" and fought "all the time." (Tr. 88.) On cross-examination appellant denied going into 1305 East

Capitol Street with Juanita about a week before September 22 (Tr. 90). It was only coincidental that he was in the vicinity of the three fires. There were frequent fires in that neighborhood. (Tr. 89.) Appellant reasoned that Anthony lied because appellant had promised to give him "a lot of money" and had been unable to do so and also because appellant had given the disease to his sister (Tr. 91).

The Government's Rebuttal Case

Inspector Meyer, recalled to the stand, said that to his knowledge there were four fires within a 15 to 20 block radius of 1305 East Capitol Street from June 1 to October 1, 1966. However, there could have been other fires not brought to his attention. (Tr. 96-98.) Anthony Johnson then testified that to his knowledge there were no fires other than the two described at 1305 East Capitol Street in the 10 to 15 block area surrounding his house during the above period. Appellant had never offered him a large sum of money. However, Anthony had asked him for a loan of 50 cents on September 22 and been refused. (Tr. 98-99.) Also recalled, William Ferguson said that he had had no fights with appellant at Laurel. He did not leave the school building from the time he first saw the flames until around 2:45 P.M. Appellant was wearing a black coat and a hat on November 8. (Tr. 102-03.)

Juanita Johnson was the final rebuttal witness. On October 10, 1966, she learned that she had received a disease from appellant. Some days later she saw him at Eastern and informed him that she did not wish to see him any more. Appellant then became angry and threatened her. About two weeks before trial appellant visited her home and stated that he had found himself and no longer entertained any ill will towards her. However, he said, to save himself from jail he was going to take the stand and tell untruths about her. (Tr. 108-10.)

Opening Statements and Closing Arguments

The prosecutor began her opening statement with a proffer of the events of September 15, 1966, a week prior

to the first fire. She then stated in chronological order and separately what the Government expected to show happened on September 22, 28 and November 8, 1966. (A. Tr. 3-6.) Defense counsel in his opening, which was reserved until the conclusion of the Government's case, stated that

the defendant's position is that these charges stem from the fact that his relationship with certain individuals who testified in this case are such that they have a bias. . . (A. Tr. 7).

In her closing argument, after reference to the language of count one of the indictment charging the September 22, 1966, fire, the prosecutor reviewed for the jury the evidence pertinent to that fire (A. Tr. 8-10). She followed a similar procedure with counts two and three and the evidence relating thereto, handling each count and the corresponding evidence separately (A. Tr. 10-14). She then analyzed appellant's testimony and his contentions of bias and ended with a reference to Juanita Johnson's rebuttal testimony (A. Tr. 14-18.)

Conceding that the fires charged had in fact occurred, defense counsel stated that the "whole crux of the matter boils down . . . to what the three witnesses that implicated this defendant had in mind when they . . . told the police the defendant was involved" (A. Tr. 18). His review of the testimony emphasized the motive which each of these three, Juanita and Anthony Johnson and William Ferguson, had to lie (A. Tr. 18-22).

In rebuttal argument the prosecutor responded to defense argument attacking the credibility of these three witnesses and pointed to evidence which corroborated their testimony (A. Tr. 22-24).

The Court's Instructions and Summary of Evidence

The court's instructions on the presumption of innocence and reasonable doubt are set out in the margin.⁴ There

⁴ [I]t is the rule of law that a defendant in a criminal case is presumed to be innocent and this presumption of innocence

were similar such instructions rendered during the *voir dire* of the jury (Tr. 4-5). He directed that "each count should be considered separately" (Tr. 125). As a preface to his summary of the evidence, Judge Youngdahl stated:

Now, judges in our federal system have a right to comment upon the evidence. This Court has refrained to do so in the sixteen years on the District of Columbia court in the District of Columbia. I prefer, rather, to briefly state the contentions of the parties to the jury and leave it competely to the jury to determine the controverted issues, free from any impressions as to how the Court feels about the facts in the case and in stating these contentions, which I will do shortly to you, even in this regard, if they appear to be out of balance or if anything appears to be in the Court's contentions which conflicts with your own recollection as exclusive judges of the facts, you, ladies and gentlemen, should rely solely on your remembrance of the evidence. (Tr. 121.)

That summary first set forth separately and in chronological order the gist of the Government's evidence as to each fire charged (Tr. 121-23) and next appellant's testimony of his activities on the dates of the fires. The court then related appellant's theories as to bias on the part of the

relates to every essential element of the offense and attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt.

Now, when I defined what is meant by proof beyond a reasonable doubt for you on the *voir dire* examination I told you I would also define it for you in my Charge at the close of the case. Reasonable doubt, as the name implies, is a doubt based on reason. It is such a doubt as would cause a juror after careful, candid and impartial consideration to be so undecided that he could not have an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt or a whimsical doubt or a doubt based on conjecture. It is a doubt which, as I say, is a doubt based on reas [sic]. The Government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt. (Tr. 117-18.)

Johnsons and William Ferguson. During this portion of the summary there was reference to a defense contention "that at one time the defendant promised to give Anthony Johnson money and when he could not keep his promise, Anthony acted in bias" (Tr. 124). The conclusion of the summary is as follows:

In rebuttal, the Government asserts that the defendant never promised Anthony Johnson money and Juanity [sic] Johnson never threatened to get even and her testimony was not biased and William Ferguson never fought with the defendant at the Laurel Children's Center and, in fact, the Government contends that the defendant threatened to do bodily hard [sic] to her and her brothers if she mentioned to anyone that the defendant had set any fires. (Tr. 125.)

The court then said immediately thereafter:

Now these in the main, briefly, are the contentions of the parties as the Court understands them to be from the evidence in this case and I repeat to you that if these appear out of balance or if anything appears to be erroneous of the testimony, you should rely upon your own remembrance [sic] of the evidence in this case. (Tr. 125.)

Defense counsel made no objections to either the instructions or the summary of evidence.

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, Section 401 provides:

Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meeting-house, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the

District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years.

Rule 8(a), Federal Rules of Criminal Procedure, provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14, Federal Rules of Criminal Procedure, provides in pertinent part:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

SUMMARY OF ARGUMENT

I

The trial judge did not commit plain error in not ordering *sua sponte* a severance of the counts of the indictment for trial. There was no defense motion for severance. A successful defense against all three charges in three separate trials was arguably more unlikely than a successful defense in a joint trial. This indicates that counsel may have chosen a joint trial as a matter of strategy. In any event, appellant's speculative claim of prejudice is insufficient to establish plain error. All three fires were properly tried together under the "simple and distinct" test. The presentation of the Government's brief and uncomplex evidence was without confusion. In closing argument the prosecutor reviewed the evidence pertaining to each count separately and with reference to that count. A

similar procedure was followed in opening statement. The judge also summarized the evidence as to each count separately. The jury was therefore unlikely to be confused by the evidence or misuse it to the prejudice of appellant.

II

The judge's mistaken statement as to why appellant threatened Juanita Johnson could not have significantly prejudiced appellant. Even if the jury was thereby misled as to the reason for the threat, this would not reasonably have affected their determination whether to believe Juanita's testimony inculpatory of appellant. Moreover, the judge cautioned the jury twice that if their recollection of the testimony conflicted with his, theirs should control.

III

The use of the word "until" in the presumption of innocence instructions, far from plain error, is appropriate and has been sanctioned by the cases. The jury would not have been left with the impression from that word that the Government always proves a defendant guilty.

ARGUMENT

- I. The trial judge did not commit plain error when in the absence of a motion for severance he did not order one *sua sponte*.

(Tr. 26-37, 39, 40, 53-55, 59, 85-86, 88-89, 121-23;
A. Tr. 3-7, 8-18)

Appellant urges this Court to reverse his convictions because the trial judge did not *sua sponte* order a severance of the counts of the indictment. His claim that the joint trial seriously prejudiced him (See Rule 14, Fed. R. Crim. P.) is obviously an appellate afterthought because no motion for severance was ever made below.⁵

⁵ The initial joinder of the counts in one indictment is not challenged, and indeed it could not be. Rule 8(a), Fed. R. Crim. P. *Drew v. United States*, 118 U.S. App. D.C. 11, 13, 331 F.2d 85, 87 (1964).

We believe the record shows that the absence of such a motion below was grounded in an arguably sound defense trial strategy and was not an inadvertent lapse. The defense theory of the case was that for various reasons Juanita Johnson, Anthony Johnson and William Ferguson were lying. Counsel could reasonably have thought that not guilty verdicts in three separate trials would have depended upon convincing three separate juries that Juanita was lying.⁶ In addition, Anthony would have to be shown a liar as to the September 22 fire and William as to that of November 8. A successful defense in three trials then would have necessitated showing 1) in one trial that Juanita and Anthony were lying about September 22, 2) in another that Juanita was lying about September 30, and 3) in a third that William and Juanita were lying about November 8. Under these circumstances counsel was perhaps well advised to choose one roll of the dice rather than three.⁷ One trial strategy having failed, appellant should not now be given the opportunity to try another.

However, even if the absence of a motion for severance was not a considered strategy decision, we do not believe that prejudice to appellant is so apparent on this record that the judge committed plain error in not ordering a severance *sua sponte*. Plain error within the ambit of Rule 52(b) is more than error which results in some prejudice to a defendant. See *Robertson v. United States*,

⁶ Appellant admitted to her on the scene of the September 22 fire that he had set it (Tr. 35, 36). She was the sole source of the Government's inculpatory evidence as to the September 30 fire (Tr. 36). And she saw him coming out of Eastern auditorium on November 8 when the fire alarm was sounding (Tr. 37). The record reflects that appellant was not a student at Eastern and his testimony relating to the Eastern fire was that he never entered the school on that day (Tr. 85-86, 88).

⁷ With this youthful appellant it would matter little if he were convicted on more than one count because consecutive sentences were unlikely. In assessing whether there was prejudicial joinder here we ask the Court to keep in mind this real possibility that as a matter of strategy appellant was better off with one trial rather than three.

124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Williams v. United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *McKnight v. United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); *Trent v. United States*, 109 U.S. App. D.C. 152, 284 F.2d 286 (1960), *cert. denied*, 365 U.S. 889 (1961). And the absence of a motion for severance surely suggests that experienced defense counsel at trial did not feel that appellant was substantially prejudiced. *Robertson v. United States*, *supra*.

As for the fires at 1305 East Capitol Street, evidence of either one would have been properly admitted in a separate trial for the other.⁹ We do not argue, however, that evidence of the Eastern fire would have been admissible in a separate trial of the 1305 fires or vice-versa. Nonetheless, all three fires were properly tried together under the "simple and distinct" test. Thereunder the joint trial of separate offenses is permissible where the evidence as to each is relatively short, simple and readily referable to the offense with respect to which it is introduced, such that it is unlikely that the jury was confused or that the verdict on one count would have turned upon the evidence applicable to another. The Government presentation should be such as to permit the jury to treat the evidence relevant to each charge separately and distinctly. See *Drew v. United States*, *supra*, 118 U.S. App. at 17-20, 331 F.2d at 91-94; *Dunaway v. United States*, 92 U.S. App. D.C. 299, 303, 205 F.2d 23, 26-27 (1953); *United States v. Lotsch*, 102 F.2d 35 (2d Cir.) (Judge Learned Hand), *cert. denied*, 307 U.S. 622 (1939). Here, the Government's evidence, while presented through twelve witnesses, was brief, clear and without complexity or confusion. The

⁹ Here, "there is a reasonable probability that the same person committed both crimes due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed," and therefore "the evidence of one would be admissible in the trial of the other to prove identity." *Drew v. United States*, *supra*, 118 U.S. App. D.C. at 16, 331 F.2d at 90. The same building was sought to be ignited twice in eight days by similar means.

key witnesses were Anthony Johnson, Juanita Johnson and William Ferguson. Anthony's testimony related only to the September 22 fire and William's only to the November 8 blaze. Juanita's direct testimony, covering slightly more than four pages of the transcript (Tr. 33-37), was carefully channeled separately and in order to the events of September 15, 22, 30⁹ and November 8. Her testimony as to each date was completed before she was called to go on to the next. In her opening statement the prosecutor proffered separately and in order what the Government expected to show happened on the four key dates. In her closing she reviewed separately and in order each count of the indictment and the evidence pertinent thereto. There was no suggestion whatsoever made to the jury to cumulate the evidence.¹⁰ The court's summary also re-

⁹ We do not believe that the jury was distracted by the discrepancy between the date alleged in count 2, "on or about September 28," and the actual date of occurrence of the fire, September 30. Juanita made it plain that September 23 was a Friday and that the second fire occurred on the following Friday (Tr. 35-36, 39). See the clarification by the prosecutor in closing statement (A. Tr. 10).

¹⁰ The prosecutor's question whether it was just a coincidence appellant was in the vicinity of three separate fires and her argument based on his affirmative reply was not such a suggestion. Rather, that he was on the scene all three times was an intrinsic weakness in appellant's story going to the question of its credibility. The prosecutor's implication was only to suggest to the jury that his testimony should not be believed. This was not such a confoundment of the defense as this Court had in mind in *Cross v. United States*, 118 U.S. App. D.C. 324, 335 F.2d 987 (1964), where the defendant wished to take the stand to deny one robbery and remain mute as to the other. When he was forced into a joint trial against his will, he felt obliged to testify about both robberies. Appellant also claims prejudice on the theory that the evidence implicating him in the November 8 fire was very thin and the primary use of that count of the indictment was to bolster the other two counts, citing *Gregory v. United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966). In *Gregory*, the evidence as to one of the two robberies was indeed weak: the one witness who identified Gregory at trial identified another person as the culprit the day after the robbery, and a second eye witness at trial testified Gregory was not the robber. Here the Government's evidence was not weak: appellant was seen by two witnesses very close to the actual fire at about the time it was set and he told one of the two a short time before the fire that he was going to burn the school down.

viewed the evidence as to each count separately and in order. In short, the record shows that the jury was unlikely to be confused by the evidence or misuse it and that appellant's claim of prejudice is based upon mere conjecture. See *Gray v. United States*, 123 U.S. App. D.C. 39, 356 F.2d 792 (1966); *Chambers v. United States*, 112 U.S. App. D.C. 240, 301 F.2d 564 (1962); *Langford v. United States*, 106 U.S. App. D.C. 21, 268 F.2d 896 (1959) Compare *Drew v. United States*, *supra*.

II. The trial judge's inaccurate statement as to why appellant had threatened Juanita Johnson did not amount to plain error.

(Tr. 91, 109-10, 124, 125)

Appellant contends that plain and reversible error occurred in the trial judge's summary of the evidence when in referring to Juanita Johnson's rebuttal testimony he stated that appellant threatened Juanita and her brothers if she told about his setting any fires (Tr. 125). The court's statement was inaccurate in that the threat was apparently made because Juanita refused to see appellant any more (Tr. 109-10).

While of course a judge may summarize and comment on the evidence (*Jones v. United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966)), he does have a duty to state it accurately. *Cooper v. United States*, 123 U.S. App. D.C. 83, 357 F.2d 274 (1966). Here the judge's minor lapse in regard to an entirely collateral matter of proof could not have prejudiced appellant significantly. To be sure, a central issue was whether the jurors were going to believe Juanita's testimony inculcating appellant in all three fires. If they believed that testimony, the issue of guilt or innocence would in no way have been affected by what they believed to have been the reason why appellant threatened her. And we do not believe that a jury mistake, if there was one, as to the reason for the threat would have been a determinative factor in their decision whether to believe Juanita's inculcating testimony. More-

over, Judge Youngdahl specifically cautioned the jury twice that if their own recollection of the testimony conflicted with his, theirs should control. One such admonition prefaced his summary and the other, at the end of the summary, immediately followed the inaccuracy complained of. When such a cautionary instruction is given, it is unlikely that a defendant was prejudiced. See *United States v. Edwards*, 366 F.2d 853 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967). An important factor again is that since counsel below did not make objection, he did not feel that the inaccuracy prejudiced appellant.¹¹

III. The presumption of innocence instructions given were correct.

(Tr. 4-5, 117-18)

Finally appellant focuses upon the use of the word "until" in the presumption of innocence instructions as plain error.¹² *Supra*, fn. 4. This contention is without merit.

¹¹ Appellant also complains that in the summary the trial judge stated that appellant claimed that Anthony was biased because appellant had refused to give him money previously promised (Tr. 124). Appellant did suggest that Anthony was also biased because of what appellant had done to his sister, Juanita (Tr. 91). The judge's statement was true as far as it went and did not say that the refusal to give the money was the only reason suggested by appellant for Anthony's bias. More important, however, it is not realistic to suppose that the jury was ever unmindful that appellant had communicated a venereal disease to Juanita and that Anthony and Juanita were brother and sister.

¹² In *Robertson v. United States*, 124 U.S. App. D.C. 309, 311, 364 F.2d 702, 704 (1966), the judge improperly told the jury 1) that doubt should be resolved in favor of the *criminal* and 2) that the burden was on defendant to explain the possession of recently stolen property *very satisfactorily*. Holding that the plain error rule did not require reversal, this Court stated:

The absence of objection suggests . . . that defense counsel, who heard the charge and was presumably alert to the inflections, did not have the impression under the circumstances that his client was being seriously prejudiced.

Neither, of course, did trial counsel here. See Rule 30, Fed. R. Crim. P.

The Supreme Court in *Coffin v. United States*, 156 U.S. 432, 459 (1895), used the word "until" in describing the presumption as follows:

This presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.

An instruction with the "until" formulation was approved in *Agnew v. United States*, 165 U.S. 36, 51-52 (1897). The instruction in the manner given has been sanctioned in District of Columbia cases. *McAffee v. United States*, 70 App. D.C. 142, 151, 105 F.2d 21, 30 (1939). *Young v. United States*, 55 App. D.C. 19, 20, 299 Fed. 883, 884 (1924). *Baer v. United States*, 54 App. D.C. 24, 26, 293 Fed. 843, 845 (1923). *United States v. Heath*, 20 D.C. 272, 285-86 (1891). See 9 WIGMORE, EVIDENCE § 2511 at 407 (3d ed. 1940). Appellant cites no case, nor have we found one, which holds the use of the word "until" error in this context—a circumstance which renders a plain error claim particularly inappropriate. The use of "until" is proper in this context because it refers to an event, the production of evidence of guilt beyond a reasonable doubt, which may happen with reference to a point in time of the trial. If that evidence is not forthcoming, the presumption of innocence remains with a defendant during the entire trial. We do not see how the court's instruction could have left the jury with the impression that the Government always proves the defendant guilty (Appellant's Br. 19). To the contrary, a presumption which can stay with a defendant "throughout the trial" can obviously still be with him at the end thereof.¹³

¹³ The reasonable doubt instructions were clearly proper. See *Moore v. United States*, 120 U.S. App. D.C. 203, 345 F.2d 97 (1965). The whole thrust and plain meaning of the presumption of innocence and reasonable doubt instructions taken together was that if the jurors entertained a reasonable doubt their verdict or verdicts should be not guilty. The jurors could not have been misled on this point.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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